



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 21, 2007

Ms. Jan Clark
Assistant City Attorney
City of San Marcos
630 East Hopkins
San Marcos, Texas 78666

OR2007-10816

Dear Ms. Clark:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID #287102.

The City of San Marcos (the "city") received a request for sixteen categories of information pertaining to a specified criminal case. You state that you have released documents responsive to nine of the categories to the requestor. You state that the city does not maintain information responsive to one of the categories of the request.¹ You claim that the submitted police report and its accompanying information are excepted from disclosure under sections 552.101, 552.103, and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We first note that the submitted information includes intoxilyzer results. Section 724.018 of the Transportation Code provides that upon the request of the person who has given a specimen at the request of a peace officer, full information concerning the analysis of the specimen must be made available to that person or the person's attorney. In this instance, the requestor appears to represent the person who gave the breath specimen at the request of

¹The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990).

a peace officer. Therefore, the submitted intoxilyzer results must be released to the requestor under section 724.018 of the Transportation Code.

Section 552.108 of the Government Code excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]” Gov’t Code § 552.108(a)(1). A governmental body that claims an exception to disclosure under section 552.108 must reasonably explain how and why this exception is applicable to the information at issue. *See id.* § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You assert that Exhibit 3 should be withheld from disclosure under section 552.108(a)(1). You have provided this office with an affidavit signed by the Hays County District Attorney that states that the documents contained within Exhibit 3 pertain to an “ongoing prosecution.” Based on these representations, we conclude that section 552.108(a)(1) is applicable to Exhibit 3. *See Houston Chronicle Publ’g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref’d n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases).

We note, however, section 552.108 does not except from disclosure basic information about an arrest, an arrested person, or a crime. Gov’t Code § 552.108(c). Such basic information refers to the information held to be public in *Houston Chronicle*. *See Open Records Decision No. 127* (1976) (summarizing types of information considered to be basic information). A complainant’s identification is considered basic information and is not excepted from disclosure by section 552.108. However, you claim that the identity of the complainant is protected by the common-law informer’s privilege. Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. The common-law informer’s privilege, incorporated into the Act by section 552.101, has long been recognized by Texas courts. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928). This privilege protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority, provided that the subject of the information does not already know the informer’s identity. *Open Records Decision Nos. 515 at 3* (1988), *208 at 1-2* (1978).

You indicate that the complainant reported a possible violation of the law to the city’s police department. You also state that “the city has no reason to believe the requestor knows the identity of the informant.” Based on these representations, the city must withhold the complainant’s identifying information, which we have marked, under section 552.101 in conjunction with the common-law informer’s privilege.

We note that the submitted report contains the arrestee’s social security number. Section 552.147(b) of the Government Code authorizes a governmental body to redact a living

person's social security number from public release without the necessity of requesting a decision from this office under the Act. Gov't Code 552.147. This requestor has a right, however, to his client's social security number. *See* Gov't Code § 552.023(b). Therefore, with the exception of the information we have marked under section 552.101, all basic information must be released to the requestor.²

In summary, the city must release the submitted intoxilizer result sheets that we have marked under section 724.018 of the Transportation Code. With the exception of basic, front page information, the city may withhold Exhibit 3 from public disclosure under section 552.108(a)(1) of the Government Code.³ However, the city must withhold the complainant's identifying information, which we have marked, under section 552.101 in conjunction with the common-law informer's privilege.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline,

²Generally, basic information may not be withheld from public disclosure under section 552.103. Open Records Decision No. 597 (1991).

³We note that because the requestor has a special right of access to some of the submitted information in this instance, the city must again seek a decision from this office if it receives another request for the same information from a different requestor.

toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Office of the Attorney General at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Reg Hargrove
Assistant Attorney General
Open Records Division

RJH/eeg

Ref: ID# 287102

Enc. Submitted documents

c: Mr. Israel Garcia
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(w/o enclosures)